

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: PHENYLPROPANOLAMINE
(PPA) PRODUCTS LIABILITY
LITIGATION,

MDL NO. 1407

ORDER DENYING PLAINTIFF'S
MOTION TO SUBSTITUTE AND
GRANTING DEFENDANT'S MO-
TION TO DISMISS

This document relates to:
Gillespie v. Wyeth, C03-3616

13 This matter comes before the court on defendant Wyeth's
14 motion to dismiss pursuant to Fed. R. Civ. P. 25 and on plain-
15 tiff's motion to substitute. Having considered the motions, the
16 court finds and rules as follows:

17 This case was originally filed on December 30, 2002. Plaintiff
18 Mae Francis Gillespie passed away on February 7, 2004. On
19 March 22, 2005, defendant filed a suggestion of death pursuant to
20 Fed. R. Civ. P. 25, triggering plaintiff's obligation to file a
21 motion to substitute a new plaintiff within 90 days. Plaintiff
22 did not do so until July 6, 2005, approximately a week after the
23 June 27, 2005 deadline and after Wyeth filed the instant motion
24 to dismiss.

25 Wyeth now seeks dismissal of plaintiff's claims for her
26 failure to comply with the Fed. R. Civ. P. 25 deadline. That rule

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1 provides, in relevant part, "[u]nless the motion for substitution
2 is made not later than 90 days after the death is suggested upon
3 the record . . . the action shall be dismissed as to the deceased
4 party."

5 While plaintiff represents that the putative substitute -
6 plaintiff's sister - is in the process of being appointed legal
7 representative of plaintiff's estate, she submits no proof that
8 such appointment has yet taken place. The court has in the past
9 found that the intent to become legal representative is an
10 inadequate substitute for actual legal representative status.
11 See, e.g., *Craven v. Wyeth*, C03-3811, July 25, 2005, Order
12 Denying Plaintiff's Motion for Substitution. Plaintiff's sister
13 is simply ineligible to be substituted for plaintiff, and the
14 motion to substitute is therefore denied.

15 Plaintiff also argues that Fed. R. Civ. P. 6 provides for an
16 enlargement of the 90-day period upon a showing of excusable
17 neglect. Plaintiff has failed, however, to demonstrate that the
18 conceded neglect of counsel and counsel's staff was excusable, or
19 indeed provide any explanation at all.¹ Under Fed. R. Civ. P. 25,
20 the court "shall" dismiss an action where plaintiff has failed to
21 file a timely motion to substitute after death (emphasis added).
22 In the absence of a showing of excusable neglect or other ratio-
23

24 ¹The affidavit offered in purported excuse merely avers that
25 plaintiff's counsel's paralegal misplaced Wyeth's motion to
26 dismiss. It is unclear in which way this excuse relates to
plaintiff's failure to timely substitute.

1 nake for an exception to the rule, the court is left without
2 discretion. This matter is therefore dismissed.

5 DATED at Seattle, Washington this 22nd day of November,
4 2005.

Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE